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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-986

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ARKANSAS LOUISIANA GAS COMPANY prays that a Writ of Certiorari issue to review the judgment and decree of the Court of Appeal, Second Circuit, State of Louisiana, entered in this cause on May 1, 1978 setting aside the judgment of the First Judicial District Court

of Louisiana in and for Caddo Parish rendered on the 5th day of December, 1977, and remanding the cause to said District Court with directions.

I. OPINIONS BELOW.

A copy of the opinion and decree of the Court of Appeal is attached in the appendix to this petition, page 2a; it is reported at 359 So.2d 255. Petitioner and Respondents filed applications in the Court of Appeal for rehearing, both of which were denied by order entered on June 6, 1978; see App. p. 21a.

Respondents and Petitioner each timely applied to the Supreme Court of Louisiana for a writ of certiorari or review of the judgment of the Court of Appeal. Petitioner's application was denied by an order of the Louisiana Supreme Court entered September 22, 1978 (App. p. 22a); and Respondents' application, which sought review and reversal of a part of the judgment of the Court of Appeal in favor of Petitioner, was granted by an order entered the same date (App. p. 23a) and is still pending in the Supreme Court of Louisiana.

The opinions in this cause of the First Judicial District Court of Louisiana in and for Caddo Parish are not reported. The original opinion dated October 14, 1977 and opinion denying new trial dated December 2, 1977 are included in the Appendix respectively at pages 24a and 39a; and the trial court's judgment is reproduced at Appendix p. 44a.

II. JURISDICTION.

The judgment of the Court of Appeal was entered May 1, 1978, rehearing was denied on June 6, 1978, and

by order entered September 22, 1978 the Supreme Court of Louisiana refused to review said judgment against Petitioner; the judgment of the Court of Appeal, Second Circuit, State of Louisiana, of which review and reversal are here sought is, under the judicial and procedural system of Louisiana, a judgment of the highest court of the State of Louisiana in which a decision in this cause could be had. The judgment of which review is sought is a final judgment within the meaning of the jurisdictional statute, *United States Code,* Title 28, § 1257(3), (App. p. 1a) as interpreted by this Court in its recent decisions, particularly *Cox Broadcasting Corporation* v. *Cohn,* 420 U.S. 469 (1975).[1]

III. QUESTIONS PRESENTED.

Central to the lawsuit involved in this case are the questions of whether the favored nation provision of Respondents' FPC Rate Schedule was activated by Petitioner's payment to the United States Government of value royalties at a rate higher than prices paid by Petitioner to Respondents under Respondents' FPC Rate Schedule and, if it were activated, what prices Respondents may collect from Petitioner.

The questions presented are: (1) whether the court below erred in failing to refer to the Federal Power Commission the interpretation of the favored nation

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[1] Since a decision in Petitioner's favor on the jurisdiction of the District Court or on the meaning and effect, under the *Natural Gas Act* (15 U.S.C. § 717, et seq.), of the price escalation provision of Respondents' Rate Schedule will be determinative of all issues in the case, Petitioner submits that, under the rules established by this Court in the *Cox Broadcasting Corporation* decision, *supra,* the judgment of the Court of Appeal is final and reviewable; see 420 U.S. 482, 483.

provision of Respondents' FPC Rate Schedule, whether the favored nation provision was activated, and, if the favored nation provision were activated, the prices that Respondents may collect under the *Natural Gas Act* and the Regulations thereunder.

(2) Whether the Court of Appeal's judgment as to the Small Producer status of Respondents and the computation of their recovery was in accordance with the *Natural Gas Act* and Commission Regulations.

IV. STATUTES AND REGULATIONS INVOLVED.

The statute of the United States involved, rights under which have been denied to Petitioner by the Louisiana courts, is Section 4 of the *Natural Gas Act*, 52 Stat. 822, 15 USC § 717c, and Regulations thereunder of the Federal Power Commission (the "Commission"),[2] *Code of Federal Regulations*, Title 18, §§ 154.92, 154.93, 154.94, 154.95, 157.40, copies of which are at App. p. 52a, 54a, 55a, 60a, and 60a.

V. STATEMENT OF THE CASE.

Petitioner ("Arkla") is an integrated gas utility engaged in all phases of the natural gas business in Arkansas, Louisiana, Texas and Oklahoma, and to a limited extent in Kansas and Missouri. It is a "natural gas company" as that term is defined in Section 2(6) of the *Natural Gas Act*, subject to the jurisdiction of

[2] The period covered by the judgment in this cause ended December 31, 1975, before the Federal Energy Regulatory Commission on October 1, 1977 succeeded to the functions and regulatory responsibilities of the Commission. The term "Commission" refers to Federal Energy Regulatory Commission as to matters occuring after October 1, 1977.

the Commission. Respondents are engaged in the production of natural gas and the sale thereof to Arkla in interstate commerce for resale and they also are "natural gas companies," as defined in Section 2(6) of the *Natural Gas Act*, subject to the jurisdiction of the Commission.

On January 11, 1952 Respondents, or their predecessors, entered into a written agreement with Arkla providing for the sale by them to Arkla of natural gas (including extractable liquids but not including condensate) to be produced from Respondents' wells in the Sligo Gas Field, Bossier Parish, Louisiana for a primary term expiring in 1980. After the decision in *Phillips Petroleum Company* v. *Wisconsin*, 374 U.S. 672 (1954), Respondents filed for and received a Certificate of Public Convenience and Necessity from the Commission in Docket No. G-3891 authorizing the sales. The 1952 contract was filed with the Commission and became Respondents' FPC Gas Rate Schedule No. 4. Under the price provisions of this contract the price to be paid by Arkla to Respondents for the gas, including all liquids contained therein except condensate, was $0.06997 with escalations each five years until the price became $0.11496 in 1975.

Section 8(D) of Respondents' gas sales contract and Rate Schedule contains the escalation provision which the parties refer to in this suit as the "favored nation provision" and which is quoted, so far as here relevant, as follows:

> "If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas

delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; *provided that in determining whether a given price is in fact 'higher' than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures* (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts. It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction." [Emphasis added].

Proceedings in the Trial Court

This suit was begun in 1974 in the First Judicial District Court of Louisiana in and for Caddo Parish. The suit claims that payments made by Arkla to the United States (which were made beginning in 1961) as royalty under an oil and gas lease (covering parts of the Barksdale Field Reservation in Bossier Parish in the Sligo

Gas Field) amounted in law to purchases of gas from a party seller and "triggered" the favored nation clause; and that Arkla has thereby incurred substantial liabilities to Respondents for higher rates for gas sold.

Under the provisions of the lease, the United States is entitled to a royalty of 16⅔% of the amount or value, at the option of the United States, of the production obtained from the leased lands. Under the terms of the government lease and the authority of the *Mineral Leasing Act,* 30 USC §§ 226, et seq., the Department of the Interior, acting through the United States Geological Survey, has the right to make a binding determination as to the value of the oil and gas produced by the lessee for the purpose of computing the amount of the value royalty. This right was exercised by notice in the form of letters to Arkla fixing the value of Arkla's share of the production from the government lease at unit values higher than the Respondents' contract prices with Arkla.

Arkla has paid royalties to the United States, under the government lease, calculated as being 16⅔% of the value of Arkla's 15% of the production from the government lease, determined, as required by the lessor, at the unit values referred to in the preceding paragraph, including value of extracted products at the price at which sold by Arkla, with no deduction for the cost of extraction.

Opinion and Judgment of Trial Court

The District Court entered two opinions—on October 14, 1977 (App. p. 24a) and on December 2, 1977 (App. p. 39a). Its judgment in favor of Respondents is at

Appendix page 44a. The court held that as a matter of oil and gas law, the United States owned the gas as it was produced and that, therefore, the value royalty was paid by Petitioner as the price of a sale and triggered the favored nation provision of the contract.

The trial court also held, on the authority of the Louisiana decision of *Interstate Natural Gas Co.* v. *Mississippi River Fuel Corp.*, 220 La. 43, 55 So.2d 775 (1951), that Respondents could not recover additional price for gas sold in the period 1961 to October, 1972 (when, the court held, Respondents attained the status of Small Producers) because they had made no Commission filing for the increased contractual rate. The court granted them judgments (App. p. 44a) for its calculated "favored nation" price increase for the period October, 1972 to December, 1975.

The demands of one of plaintiffs, W. E. Hall, Jr., were rejected on the ground that he had agreed to an amendment of his contract with Arkla deleting the favored nation clause. It should also be stated that by an earlier opinion (App. p. 46a) the District Court had entered an interlocutory order overruling Petitioner's declinatory exception to the court's jurisdiction on the ground that the Commission was vested with primary and exclusive jurisdiction over the questions presented by the lawsuit.[3]

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[3] Following the overruling of its declinatory exception, Respondent filed a petition with the Commission for a declaratory order construing Respondents' rate schedule and determining the rates at which each of Respondents was entitled to be paid in the period involved in this suit. The Commission, while agreeing that it had jurisdiction, denied the petition, holding that it would defer to the state court. Petitioner sought review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit (Case No. 77-1146, *Arkansas Louisiana Gas Company* v. *Federal Power Commission*). During pendency of the review proceedings, the Commission sought, and the Court of Appeals granted, remand of the declaratory proceeding to the Commission for further consideration.

Opinion of Court of Appeal

On appeals by all parties to the Louisiana Court of Appeal, Second Circuit, that court in an opinion entered May 1, 1978 (App. p. 2a), reported at 359 So.2d 255, affirmed the District Court's judgment in all respects except as to *quantum*. On the basic issue of Arkla's liability the Court of Appeal's reasoning was different from the trial court's ruling: the appeal court in a short paragraph in its opinion (App. p. 9a) rejected the ground on which the District Court had found Arkla liable, holding that Arkla was correct in arguing that its payment to the federal government of royalty was a payment of rent and not the payment of the price of a sale. The court then went on to say:

> "We nevertheless find it inappropriate to accept the technical and restrictive interpretation on the term 'purchase from another party seller' relied on by defendant under the circumstances shown in this instance."

The court concluded that the favored nation provision should be construed in the interest of the seller and held that it was activated.

As to *quantum*, the Court of Appeal affirmed the District Court as to Respondents' Small Producer status and reversed and remanded the judgment for recalculation with directions that, as Petitioner submits, ignored constraints imposed by Commission regulations.

Respondents applied to the Supreme Court of Louisiana for review of the Court of Appeal's judgment and decree insofar as they rejected their demands, and Petitioner applied for review of that part of the judgment against it. Respondents' application was granted and Petitioner's application denied by separate orders entered September 22, 1978 (App. pp. 23a and 22a).

Federal Questions Raised in Lower Courts

Petitioner recounts its continuous and repeated efforts to protect and achieve its rights and immunities which it has specially set up and claimed under the *Natural Gas Act:*

(1) Petitioner's answer to Respondents' petitions in the trial court put at issue, in part in reliance on the *Natural Gas Act,* Respondents' interpretation of the favored nation provision of their Rate Schedule; and set up, in the alternative, defenses under the *Natural Gas Act* as to Respondents' right to recover any amounts not in accord with their rates on file and effective under the *Natural Gas Act.*

(2) The rules of the Louisiana courts of appeal include Rule IX-A which requires that the appellant specify the errors in the lower court's opinion of which he complains and provides further as follows:

> "Ordinarily, however, the courts of appeal will review only issues which are submitted to the trial court and which are contained in the specification of errors in the briefs or in an application for writs, unless the interests of justice clearly require otherwise."

Petitioner's brief in the Court of Appeal specified, and among others, the following errors and issues:

(a) The error of the District Court in holding that it had jurisdiction of the case.

(b) The error of the District Court in holding that the favored nation clause was activated, in part on the ground that such holding was contrary to the *Natural Gas Act* and the decisions of the courts of the United States thereunder.

(c) The error of the District Court, under the provisions of the *Natural Gas Act*, in permitting change to be made in Respondents' sales contract without approval of the Federal Power Commission, and the consequent errors in the court's computation of Respondents' recovery.

(d) The District Court's error in holding that all of plaintiffs had the status, under the *Natural Gas Act,* of "Small Producers".

(e) The issue of the correctness of the trial court's decision that Respondents' could not recover additional price, without a filed rate, in the period 1961 to October, 1972.

(3) In its application to the Court of Appeal for rehearing dated May 15, 1978, Petitioner again insisted upon its rights under the *Natural Gas Act.*

(4) In its application to the Supreme Court of Louisiana for review of the judgment and decree of the Court of Appeal, Petitioner's Assignments of Error raised the same issues which were argued in the Court of Appeal.

Throughout this litigation Petitioner has insisted upon its rights, privileges and immunities under the federal law which have been, with limited exceptions, denied to it by the Louisiana courts.

VI. REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED.

A. The Louisiana courts do not have power or authority to determine the rate at which Respondents' gas was or will be sold. One of the few questions recurring under the *Natural Gas Act* which has been well settled is that neither the regulatory commission nor any court has power to fix retroactively a price at which gas has been sold; a corollary is that they cannot entertain a damage suit, under a contract or otherwise, in which the plaintiff's claim depends upon proof as to a rate which is other than that lawfully on file with the Commission, in the case of gas under the *Natural Gas Act,* and in the case of electric power under the *Federal Power Act.* See *Natural Gas Pipeline Co.* v. *Panoma Corp.,* 349 U.S. 44 (1955); *Socony Mobil Oil Co.* v. *Brooklyn Union Gas Co.,* 299 F.2d 692 (5th Cir. 1962), *cert. denied,* 371 U.S. 887 (1962); and *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 251 (1951), in which this Court said of a suit similar to Respondents' suit here:

> "... It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."

B. The Commission, not the courts, should interpret Respondents' FPC Rate Schedule. This Court has consistently held that matters involving the interpretation of a tariff or rate schedule should be decided by the regulatory agency in the first instance. See *Texas & Pacific R. Co.* v. *American Tie & Timber Co.,* 234 U.S. 138 (1914); *Far East Conference* v. *United States,* 342 U.S. 570 (1952); *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1932); and *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970).

The jurisdiction of the Commission over a gas purchase contract on file with the Commission as a rate schedule has been recognized by this Court. See *Northern Natural Gas Co.* v. *State Corporation Commission,* 372 U.S. 84, 85, 92 (1963); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.,* 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103 (1958). In these same cases, the Court has approved the Commission's regular practice of interpreting contracts on file with it as rate schedules, and of determining the meaning of such rate schedules.

The Louisiana Court of Appeal's error in rejecting Petitioner's argument that the Commission has primary jurisdiction is apparently based on its understanding of the law which it expressed as follows (App. pp. 7a-8a):

> "Defendant's initial argument is in error because the relief sought is not that of a rate increase but is instead a claim for damages arising under state contract law. . . . [This court] is a proper forum for adjudication of a state contract law dispute. Furthermore, the Natural Gas Act evinces no purpose to abrogate private rate contracts. . . . The

> Act recognizes the rights of the parties to rates established by individual contract and does not alter ordinary contractual relationships where the controversy is one of ordinary contract law. . . . A claim founded on state contract law does not lose its character just because the Natural Gas Act is in some way involved."

The emphasis placed by the Court of Appeal upon the fact that the Rate Schedule began as a contract between private parties, loses sight of the fact that it is no longer subject to the parties' will. Rather, the contract and any proposed changes must conform strictly to the *Natural Gas Act* and the procedures required thereunder.

The interpretation of the favored nation provision of the Rate Schedule requires the expertise and special competence of the Commission. For example, the provision not only requires a comparison of prices but also requires a comparison of provisions of the two contracts, such as "point of delivery, basis of measurement, taxes, dehydration, and delivery pressures," among others, to determine "whether a given price is in fact 'higher' than the price provisions" of the contract between Petitioner and Respondents. The interpretation of the Rate Schedule also involves questions of policy, e.g., is the rate provided by the Rate Schedule favored nation clause just and reasonable; should the Rate Schedule be construed broadly in favor of lower gas rates, or should it be construed broadly in favor of higher prices for the independent producer natural gas company; is the producer the kind of seller contemplated and are the words "purchase" and "seller" used as they are commonly employed in the gas industry. The court below should have referred the question of whether the favored nation clause was triggered to the Commission together with the question of the appropriate price if it was triggered.

This Court in its opinion in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 63-64 (1956), compared the rules with respect to "primary jurisdiction" and the rules with respect to "exhaustion of administrative remedies" as follows:

> " 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its view."

The Court in the *Western Pacific* case also called attention to its decision in *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922), where it had held that "where the question is simply one of construction the courts may pass on it as an issue 'solely of law.' " 352 U.S. at 66. But then the Court went on to say:

> "But where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that 'the enquiry is essentially one of fact and of discretion in technical matters,' then the issue of tariff-application must first go to the

> Commission. The reason is plainly set forth: such a 'determination is reached ordinarliy upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.' "

The issue of triggering in the present suit surely is one of those that is required to be passed on, under the decisions of this Court, in the first instance by the Commission. The Commission has described in several cases the burden of proof on a producer in order for the Commission to hold that a favored nation clause has been triggered by the purchaser paying another producer a higher rate; see *Shell Oil Co., et al,* Memorandum Opinion No. 382, 29 F.P.C. 498, 499 (1963); aff'd, *Shell Oil Co.* v. *FPC,* 334 F.2d 1002 (3rd Cir. 1964); *West Texas Gathering Company,* 29 F.P.C. 510 (1962); and *Morris Mizel, et al.,* Opinion No. 407, 30 F.P.C. 1103 (1963). In order for the triggering to occur, the producer filing the most favored nation rate increase must show, *to the Commission:*

(1) that the other producer is the type of seller contemplated and producing in the area indicated;

(2) that the gas being purchased from the other purchaser is comparable gas;

(3) that the rate being paid for it is higher in fact as well as in appearance;

(4) that the rate sought is a just and reasonable rate; and

(5) that the "purchase" compared is in fact an agreement of the type contemplated.

The uniformity of rate regulation under the *Natural Gas Act* requires that the Commission determine whether triggering occurred in the instant case measured against these standards.

The Rayne Gas Field case, *United Gas Improvement Co.* v. *Continental Oil Co.,* 381 U.S. 392 (1965), illustrates precisely the reason that the Commission should determine the meaning and legal effect of contracts for the sale of natural gas subject to the Commission's jurisdiction. In that case the Commission determined, largely on the basis of the dominant price reducing purpose of the *Natural Gas Act,* that the assignment, or sale, of developed oil and gas leases in the Rayne Gas Field, in Louisiana, to an interstate pipeline was, under the *Natural Gas Act,* a sale of gas in interstate commerce; and this Court affirmed the Commission's determination, a decision which almost certainly would not have been reached by a Louisiana court.

The present suit was tried for many days (the transcript contains 4,987 pages of testimony) and 367 exhibits were introduced by plaintiffs and 87 by defendant. It involves the meaning and application of terms that call into play the expertise of the Commission in the field of natural gas and the need for uniformity in their application under the *Natural Gas Act.* As this Court stated in *Great Northern Co., supra,* "the enquiry is essentially one of fact and of discretion in technical matters," which requires that "the issue of tariff application must first go to the Commission."

The Louisiana Supreme Court is committed to, and has recently reaffirmed, the necessity of exhaustion of administrative remedies and the need to respect the primary jurisdiction of an administrative tribunal,

which this Court pointed out in the *Western Pacific R. Co.* case, *supra*. See also, *Steeg* v. *Lawyers Title Insurance Corp.*, 329 So.2d 719 (La. Sup. Ct. 1976); *Porter* v. *O'Neal*, 205 La. 445, 17 So.2d 622 (1944); *O'Meara* v. *Union Oil Co.*, 212 La. 745, 33 So.2d 506 (1948).

The Louisiana courts have consistently deferred to the administrative remedy where the question before the court has been one within the jurisdiction and competence of a Louisiana administrative tribunal, regardless of whether or not the administrative tribunal has been granted exclusive jurisdiction. Their failure in this case to defer to the competence and expertise of a federal commission which has power and jurisdiction to decide the issue before it, and where the federal courts would be bound to defer to the administrative tribunal under the settled federal law,[4] is denial to Petitioner of a right granted to it by the federal law.

C. Under federal law, which is determinative of the triggering issue, the payment of royalty to the United States as lessor did not activate the favored nation clause, which was conditioned on the "purchase from another party seller"; and the Court of Appeal committed error in failing to recognize the features of the contract which are governed by federal law and that federal law controls the interpretation of the contract.

The Court of Appeal in adopting a broad interpretation of the contract favoring the seller (359 So.2d 261, App. pp. 9a-10a) ignored controlling federal decisions furnishing a definition of the terms used.

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[4] See the order entered on September 6, 1978 in *Tenneco Oil Co.* v. *FERC*, 580 F.2d 722 (5th Cir. 1978).

In *Mobil Oil Corporation* v. *FPC*, 364 F.2d 256 (D.C. Cir. 1971); *cert. den. sub. nom., FPC* v. *Mobil Oil Corporation*, 406 U.S. 976 (1972), the court held, what is now the settled federal law, that a royalty settlement under an ordinary market value oil and gas lease was not in fact a sale of gas in interstate commerce over which the Commission had rate jurisdiction; and that neither under the common understanding of the words used, industry parlance, economic equivalent or any other foundation, was the royalty settlement a sales transaction. See also, *Burnett* v. *Harmel*, 287 U.S. 103 (1932).

In *Northern Natural Gas Co.* v. *State Corporation Commission*, 372 U.S. 84 (1963) this Court determined that conservation orders of the Kansas State Corporation Commission were invalid because they would interfere with the producer contracts "duly filed with the Federal Power Commission" which are within the "paramount and exclusive authority" of the federal agency, 372 U.S. at 85, 92. The Court said, 372 U.S. at 91-93:

> "These state orders necessarily deal with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act. They therefore invade the federal agency's exclusive domain."
>
> * * * *
>
> "It may be true, as the State Commission urges, that accommodation on the part of the Federal Power Commission could avoid direct collision—but this argument misses the point. Not the federal

> but the state regulation must be subordinated, when Congress has so plainly occupied the regulatory field."

In *Appalachian Power Co.* v. *FPC*, 529 F.2d 342 (D.C. Cir. 1976) *cert. denied*, 429 U.S. 816 (1976), it was held "that the Commission had properly treated [state] law as irrelevant to the interpretation of contracts" on file as rate schedules, 529 F.2d at 347. The Commission's order in *Appalachian Power Co.*, 49 F.P.C. 387, 388 (1973) was affirmed, where it was held:

> "[S]tate law is not relevant to these wholesale rates, which are under the jurisdiction of the Federal Power Commission."

Terms used in the *Natural Gas Act* and in a Commission Rate Schedule should not have one meaning if they come from Texas and another meaning coming from Louisiana. See *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965), where the Court said, 381 U.S. at 400:

> "A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law."

Of more importance than the Louisiana court's excessive liberality with the terminology used in the contract is its failure to observe the rules of interpretation established by this Court under the *Natural Gas Act*. As the Court said in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 685:

> "Protection of consumers against exploitation at the hands of natural gas companies was the primary purpose of the Natural Gas Act."

See also, *United Gas Improvement Co.* v. *Continental Oil Co., supra, FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1 (1961); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960); *NAACP* v. *FPC*, 425 U.S. 662 (1976); *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

It is obvious that the Court of Appeal did not adopt a construction of the Rate Schedule which would carry out the *Natural Gas Act's* primary purpose of protection of consumers against exploitation. Nor did it refer to the Commission's policy, in effect for more than 15 years, of refusing to permit indefinite price escalation provisions (favored nation provisions) in newly filed rate schedules; *Code of Federal Regulations*, Title 18, § 154.93 (App. p. 54a). The Court of Appeal's reference to the prevention of discrimination by the buyer furnishes extremely tenuous support; and the court noted in its opinion (App. p. 9a) that Petitioner had refused to make market value the trigger of the favored nation provision. A lessee has no choice under the ordinary form of oil and gas lease as to the payment to his lessor of market value in calculating the royalty. It is common knowledge that a high price for natural gas is supported in Louisiana as a matter of public policy, enhancing the interest of one of the dominant industries of the state in which the citizens generally, owning the land and drawing royalties, have the same interest as the gas producer. It is also well known that the State of Louisiana depends in major part for its public revenues upon taxes levied on the production of oil and gas. Since the only reason given by the Court of Appeal for its very broad interpretation does not bear analysis, we submit that we are justified in assigning

the state policy for high oil and gas prices as the public policy adopted by the courts.

D. The Court of Appeal prescribed detailed directions as to how the computation should be made of Respondents' increased prices (App. pp. 17a-20a), a matter which surely should be decided by the Commission alone.

The gas contract between Respondents and Petitioner provided for the delivery of gas at wellhead and payment of the price which was specifically stated as including such liquids as could be extracted from the gas. The lease contract between Petitioner and the United States, as administered by the United States Geological Survey, required Petitioner to process the gas for extraction of liquids (at no cost to the government) and base its royalty settlement on the reduced volume as it issued from the tailgate of the extraction plant plus a settlement for the market value of the extracted liquids. The government also required Arkla to process the condensate (oil produced with the gas, which in the case of Respondents' contract Petitioner was under no obligation to buy), and to pay the United States, without deduction, the market value of the upgraded product.

In the guise of making the "price" under the gas purchase contract comparable with the "price" under the oil and gas lease, the remand order of the Court of Appeal has the effect of requiring the lower court to adopt the same settlement provisions as are in the royalty settlements with the United States.

Without going into detail, this will have the effect of (1) requiring significant changes in Respondents' Rate Schedule and (2) raising the total consideration

for the gas to be paid to Respondents materially above the maximum area rates. The first is flatly in conflict with Section 4 of the *Natural Gas Act* and the regulations thereunder, as a change in Respondents' Rate Schedule will be required; and the second flatly conflicts, even conceding that all of Respondents are Small Producers, with the Small Producer regulations, which limit contractual price increases to the area rate.

E. This suit presents important questions in the administration of the *Natural Gas Act* which will affect not only this case but many others: first, should the meaning and effect of gas rate schedules be determined by state courts applying local law; and second, and equally important, should a state court in construing a gas rate schedule apply state contract law and local legal policy, or is it bound to apply federal law and controlling precedents and policies under the *Natural Gas Act*.

VII. CONCLUSION.

For the reasons stated, a writ of certiorari should be granted in this case to review the judgment rendered May 1, 1978 in this case by the Court of Appeal, Second Circuit, State of Louisiana.

Respectfully submitted,

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APPENDIX

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APPENDIX A

United States Code, Title 28.

§ 1257. STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX B

No. 13,549

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

• • • • •

May 1, 1978

FRANK J. HALL, ET AL, *Plaintiffs-Appellants*

v.

ARKANSAS-LOUISIANA GAS COMPANY, *Defendant-Appellant*

• • • • •

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Honorable C. J. Bolin, Jr., Judge

• • • • •

WIENER, WEISS, MADISON & HOWELL
by James Fleet Howell — *Attorney for Plaintiffs-Appellants*

BLANCHARD, WALKER, O'QUIN & ROBERTS
by Robert Roberts, Jr. — *Attorneys for Defendant-Appellant*

• • • • •

Before: PRICE, MARVIN, JONES, JJ.

By Price, J.

Plaintiffs seek damages for an alleged breach of contract by defendant for failing to escalate the price of gas purchased from them in accord with a price adjustment provision contained in a long-term gas purchase contract.

Plaintiffs are either independent producers or owners of various mineral interests under numerous leases producing natural gas in the Sligo Gas Field of Bossier Parish. Defendant, Arkansas Louisiana Gas Company (Arkla) is a large integrated gas utility company, which engages in exploration, production, transmission, purchase, and sale of natural gas and its by-products. Arkla has for many years been a major purchaser of gas in the Sligo Field.

The gas purchase contract forming the basis for this litigation was executed in 1952 between Arkla and several independent producers pursuant to a lengthy renegotiation of an existing contract which had been in effect since 1937, and which would have expired in 1954. Although all of the multiple plaintiffs herein were not original parties to the 1952 contract, they have subsequently become parties subject to the agreement by amendment or by operation of law. The 1952 agreement obligated plaintiffs to sell all of the gas produced or owned by them in the Sligo Field to Arkla for a period of twenty-eight years and provided for a fixed schedule of prices per MCF to be paid for raw gas throughout the period of the contract. The agreement further contained a price adjustment provision referred to in the contract as a "Favored Nations Clause," providing:

> (D) If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; provided that in determining whether a given price is in fact "higher" than the price provision of this contract, the inquiry shall not be limited to the actual prices stipu-

lated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts. It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction.

In February 1961 Arkla acquired, as lessee, a fifteen percent interest in an oil and gas lease granted by the United States on approximately 2,400 acres of land owned by it in the Sligo Field. Arkla participated with its co-lessees in drilling for and producing gas in substantial amounts from this leased acreage. Arkla has taken its fifteen percent share of the gas produced into its own processing plant in the Sligo Field and disposed of it through its own distribution system including transmission through an interstate pipeline. The lease from the United States stipulated a royalty to be paid by the lessees of a percentage of the oil or gas production obtained or, at the option of the United States, a payment in money by the lessees of the fair market value attributed to its percentage of production. The government has continuously elected to be paid a "value royalty," and in accord with the right reserved by it to have

the Secretary of Interior establish the reasonable minimum value of gas for computation of royalty due, the price determined and ultimately acceded to by Arkla was and has continued to be in excess of that being paid plaintiffs under the 1952 contract.

Plaintiffs brought this action in October 1974 alleging that the payment of the higher price to the United States by Arkla beginning in 1961 activated the provisions of the Favored Nations clause of the 1952 contract and obligated Arkla to increase the purchase price paid plaintiffs commensurate with the price paid the government.

Plaintiffs seek compensatory damages and an accounting from Arkla alleging that it was in bad faith in intentionally concealing from them for fourteen years that a higher price was being paid for gas to the United States.

Arkla filed appropriate responsive pleadings questioning the jurisdiction of the state court alleging that the gas purchases in question have always been subject to the provisions of the Natural Gas Act, and solely within the jurisdiction of the Federal Power Commission (FPC), which has since been superseded by the Federal Energy Regulatory Commission (FERC). Arkla's attempt to have the case removed to the Federal District Court on that basis was denied.

In answer to the original and several amended pleadings of plaintiffs, Arkla denied it had triggered the Favored Nations clause of the 1952 contract by payment of an amount for gas to the United States which exceeded that being paid plaintiffs since the payment to the United States was solely a "rental royalty" and not a purchase of gas from another "party seller" as required for activation of the price adjustment provision.

An exception of no cause of action was filed by Arkla against the claim of one of plaintiffs, W. E. Hall, Jr., on the basis that he executed an amendment to the contract

dated May 25, 1969, which deleted the benefit of the Favored Nations clause as to him. Hall through responsive pleadings contends the amendment by him was ineffective because it was executed in error as he had no knowledge at the time that Arkla had previously breached the contract by paying the higher price to the United States.

After a very lengthy trial on the merits,[1] the district court sustained the exception of no cause of action as to the claims of W. E. Hall, Jr., and dismissed his demands. The court rendered judgment for all other plaintiffs as follows:

Frank J. Hall	$135,413.44
Virgil J. Hall	36,930.88
Carlyle W. Urban, Trustee under Will of H. M. Harrell	202,954.56
John K. Harrell, Sr.	25,368.96
James E. Harrell	25,368.96
Elva L. Weiss	56,853.12
National American Bank, Executor under Will of Seymour Weiss	56,853.12
T. F. Philyaw	1,187.84
W. O. Cochran	4,644.16
D. B. McConnell	42,301.76
James A. Noe, Jr. and C. T. Munholland, Testamentary Executors under Last Wills of Mr. and Mrs. James A. Noe	153,128.96
S. G. Myers	130,215.91
Asa Benton Allen	21,530.24
Elaine Allen	20,874.88

There are several issues on appeal which can be generally categorized as follows: (1) whether the Federal Energy

[1] The pleadings and testimony consume twenty-six volumes containing 4,987 pages. There are additionally over 360 exhibits offered by plaintiff and over 80 offered by defendant.

Regulatory Commission has the sole and exclusive subject matter jurisdiction; (2) whether the Favored Nations clause was activated when defendant paid value royalty at a higher price to the United States than it paid for gas purchases to plaintiffs; (3) whether W. E. Hall, Jr., validly waived his interest in the Favored Nations clause when he signed an amended contract in 1969; and (4) whether the award of damages by the trial court was correct.

I. Jurisdiction

The threshold issue on appeal is whether the trial court had proper subject matter jurisdiction to entertain this suit. Defendant contends the trial court lacked the power and authority to determine the rate at which natural gas was or is sold in interstate commerce since the rate-making function is vested solely and exclusively in the FERC by the Natural Gas Act. Defendant further contends that the FERC has primary jurisdiction to determine the contractual issue of whether the Favored Nations clause of the 1952 contract was activated by its payment of value royalty to the United States. Neither of these contentions can be maintained. Defendant's initial argument is in error because the relief sought is not that of a rate increase, but is instead a claim for damages arising under state contract law. Although the state court must adhere to the provisions of the Natural Gas Act and the pertinent regulations of the FERC in its determination of damages, it is a proper forum for adjudication of a state contract law dispute. Furthermore, the Natural Gas Act evinces no purpose to abrogate private rate contracts. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 76 S.Ct. 373 (1956). The act recognizes the rights of the parties to rates established by individual contract and does not alter ordinary contractual relationships where the controversy is one of ordinary contract law. *Cities Service Gas Company v. Federal Power Commission,* 255 F.2d 860, *cert. den.* 358 U.S. 837, 79 S.Ct. 61 (1958); *Skelly Oil Co. v. Federal Power Commission,*

532 F.2d 177 (1976); *Phillips Petroleum Co. v. Federal Power Commission*, 349 F.2d 535 (1965). A claim founded on state contract law does not lose its character just because the Natural Gas Act is in some way involved. *Pan American Petro. Corp. v. Superior Court of Del.*, 366 U.S. 656, 81 S.Ct. 1303 (1961).

Defendant's contention that the FERC has primary administrative jurisdiction to decide this contract dispute is also in error. In recent years the doctrine of primary administrative jurisdiction has been refined to apply to claims involving the special competence and expertise of an administrative body. *Montana-Dakota Util. Co. v. Northwestern Pub. S. Co.*, 341 U.S. 246, 71 S.Ct. 692 (1951); *Best v. Humboldt Placer Mining Company*, 371 U.S. 334, 83 S.Ct. 379 (1963); *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161 (1956). State courts do have jurisdiction to determine matters of contract law not within the specific technical expertise of the FERC. *Pan American Petro Corp. v. Superior Court of Del., supra.* The major issue in the case before us is one of construing the provisions of a contract and the intentions of the parties at the time of the execution of the contract. Such a determination does not require the specific technical expertise of the FERC. Although the FERC may have original jurisdiction in this case, it does not have exclusive original jurisdiction, but rather shares concurrent original jurisdiction with the state court.

II. Activation of the Favored Nations Clause

Plaintiffs contend payments made to the United States by defendant in its dual capacity as lessee and pipe-line purchaser are tantamount to a "purchase from another party seller," as this term was intended in the price adjustment clause of their 1952 gas sales contract with defendant. Defendant contends the payments were royalty or rent being paid in its position of lessee and not a purchase because the United States had no title to any gas produced

under the lease, it having continuously elected to accept a value royalty on the gas produced.

We recognize that the theory of ownership and classification of lease royalty payments as rent as urged by defendant is in accord with the prevailing state law and federal decisions on this issue. See *Shell Petroleum Corp. v. Calcasieu Real Estate & O. Co.*, 185 La. 751, 170 So. 785 (1936); *Logan v. State Gravel Co.*, 103 So. 526 (La. 1925); *Board of Com'rs. of Caddo Levee Dist. v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (La. 1929); *Melancon v. Texas Company*, 230 La. 593, 89 So. 2d 135 (1956). *Mobil Oil Corporation v. Federal Power Commission*, 463 F.2d 256 (1971), *cert. den.* 406 U.S. 976, 92 S.Ct. 2413 (1972).

We nevertheless find it inappropriate to accept the technical and restrictive interpretation on the term "purchase from another party seller" relied on by defendant under the circumstances shown in this instance.

The evidence shows that during the lengthy negotiations between defendant and the principal plaintiffs in 1952, defendant's prime objective in renegotiating the preexisting contract was to commit the plaintiffs to a long-term contract. As an inducement for a twenty-eight-year-term the officials of the defendant corporation offered to include a Favored Nations clause. The request by plaintiffs to have the clause pivot on the highest market price being paid by *anyone* in the field was rejected by defendant.

The handwritten notations made at that time by the defendant's attorney who prepared the final draft of the agreement show that his instructions from the official of defendant handling the negotiations were to prepare a price adjustment clause based on "highest price we pay for gas in the Sligo Field." Thereafter, agreement on the subject clause was reached which tied it to the highest price being paid by *defendant* in the Sligo Field.

There is no evidence suggesting the description of the contracting parties as "Buyer" and "party sellers" was in-

tended to have any restrictive legal meaning and the terms were apparently standard phrases contained in a Favored Nations clause of another contract used as a model by the attorney drafting the agreement. Indicative of the fact that little thought was given to these terms having any significant restrictive effect on the broad application of the clause is the absence of a definition of the words "Buyer" and "party seller" within the agreement. Although defendant strenuously urges that the terms "Buyer," "seller," and "purchase" as used in the Favored Nations Clause has a restrictive legal meaning and limits the applicability of the clause to "sales" of gas, defendant's actions subsequent to execution of the contract show a tendency on its part to use sales terminology in a very broad manner to also include royalty interests in the preparation of division orders and the payment of royalty to lessors from a bank account styled "Gas Purchase Account."

The general rule of contract interpretation concerning a Favored Nations clause is that "in order to give effect to the intention of the parties the Court must consider the circumstances surrounding the making of the contract, its subject, and the situation and relation of the parties at the time of its making; *and the construction placed upon the contract by the parties to it as reflected by their words and acts is entitled to great, if not controlling influence in ascertaining the parties' understanding of its terms.*" [emphasis added] *Louisiana-Nevada Transit Co. v. Woods,* 393 F. Supp. 177 (1975).

The basic purpose of a price adjustment or Favored Nations clause is to protect a seller from discrimination by the pipe-line purchaser of gas under a long-term contract. *Eastern Petroleum Company v. Kerr-McGee Corporation,* 447 F.2d 569 (1971); *Louisiana-Nevada Transit Co. v. Woods, supra.* As it is intended for the protection of the seller, the clause should be broadly construed to effectively carry out this purpose. Therefore, to exclude the substantial amounts paid to the government by defendant as having any bearing on the price being paid for gas by defendant in this field because of a technical semantic classification of the payment as being rent royalty would render the protection intended to be afforded plaintiffs by a price adjustment clause meaningless.

The factors affecting our decision on this issue are analogous to those presented in *Eastern Petroleum Company v Kerr-McGee Corporation, supra,* in which the court found a payment of royalty to the state of Arizona under a lease of public lands to activate a Favored Nations clause in a contract providing that payment for gas "shall never be less than the price paid by Buyer to other sellers of helium-bearing gas from leases or lands in the same general area." The defendant pipe-line purchaser in that case contended the payment of royalties to the state was not a "price" paid to another "seller" within the meaning of the contract as the gas was "owned" by the lessee at the time it was reduced to possession. The court found it unnecessary to decide whether the payment under the lease to the state was a purchase of gas or royalty as either classification was within the purpose and intent of the price adjustment clause of the contract before it. As we are unaware of any appellate decisions in this state concerning the interpretation of such unusual contractual provisions, we are constrained to follow the federal jurisprudence in resolving this question.

For the foregoing reasons, we conclude the trial court was correct in holding that the payment by defendant for gas produced under the lease from the United States was within the scope of the price adjustment clause of plaintiffs' contract.

III. Waiver of Favored Nations Clause By W. E. Hall, Jr.

On May 25, 1969, W. E. Hall, Jr., one of the numerous plaintiffs herein, executed an amendment to the 1952 gas purchase contract wherein he deleted his interest in the Favored Nations clause. Defendant asserts plaintiff's waiver as an affirmative defense against his claim for damages arising under the price adjustment clause. Plaintiff contends the waiver was ineffective because he executed the amendment under an error of fact induced by defendant's misrepresentations and concealment of the true facts causing him to believe the price adjustment clause had not been activated. Plaintiff contends he would not have deleted the clause had he known of the higher prices being paid by Arkla to the government. However, plaintiff's testimony reveals that in 1969 Hall had an interest in a well under contract to Texas Gas Producing Company with gas produced therefrom being sold to the latter. At that time the well had nearly depleted, and the pressures were dropping. In order to keep from having to cap the well, Hall contacted defendant who agreed to take over the well and use its pipe lines wherein the pressures would be lower, thus allowing the well to keep producing. In order to contract with defendant, plaintiff had to execute an amendment deleting the Favored Nations clause to comply with the FPC's more recent regulations prohibiting the inclusion of such a clause in a gas purchase contract. By using defendant's pipe lines, Hall was able to sell the gas without having to compress it. He testified that the main reason for executing the contract was to keep selling the gas without having to buy and operate a compressor to compress the gas.

The Louisiana Civil Code articles dealing with error of fact (C.C. Arts. 1820-1845) provide that a contract will not be considered invalid unless there was error as to the "principal cause," or "motive," for making the contract. C.C. Art. 1825. In this case the principal motive for W. E. Hall, Jr.'s signing the contract was to continue selling gas without the expense and time of having to purchase and operate a compressor. Therefore, as correctly found by the trial court, there was no legal error of fact upon which this plaintiff can rely to vitiate the waiver.

IV. Damages

The first issue presented in determining the correctness of the award made to plaintiffs is the effect the "filed rate doctrine" of the Natural Gas Act has on the rights of plaintiffs to recover damages. Sections 4(c) and 4(d) of the act require a seller of natural gas to file a proposed rate increase with the FPC for its approval before such an increase can be effective. The only rate schedule ever filed by plaintiffs with the FPC in this instance was the original gas purchase contract in 1952. The FPC regulations, § 157.50(c), provide an exception to the foregoing rule in regard to a "small producer" as defined in the regulation, who has obtained a certificate from the commission exempting him from having to file a rate schedule as long as the increase in rate does not exceed the ceiling rate set by the commission. Several of the plaintiffs obtained certificates as small producers in October 1972, and the certificates issued to those parties were made effective to all plaintiffs in this action by the order of the FPC.

The trial court found that the plaintiffs were precluded by the Natural Gas Act from recovering damages, which are measured by a standard related indirectly to a retroactive price increase, except for the period subsequent to the issuance of the small producer certificates in October 1972. This holding is in accord with the jurisprudence construing the effect of this statute. *Interstate Natural Gas Co., Inc. v. Mississippi River Fuel Corporation,* 220 La. 43, 55 So. 2d 775 (1951); *Ashland Oil & Refining Co. v. Federal Power Commission,* 421 F.2d 17 (1970); *Socony Mobile Oil Co. v. Brooklyn Union Gas Co.,* 299 F.2d 692 (1962).

Although plaintiffs claim quantum based on an amount commensurate with the difference between the price they received and that which they would have received had they been granted a price increase in 1962, they contend their suit is for damages and not for a retroactive price increase, and is therefore not affected by the Natural Gas Act.

Plaintiffs' alternative theory of recovery is that they should recover for damages caused by the fraudulent concealment by defendant of the fact it was paying a higher price to the United States for gas which prevented them from timely filing for a change in rate schedule with the FPC.

Neither of these positions is tenable. The action for damages to be successful necessarily assumes a price increase would have been granted by the FPC. That such approval would have been granted by the commission is highly speculative and cannot serve as a basis for an award of damages. See *Interstate Natural Gas Co. v. Southern Cal. Gas Co.*, 102 F. Supp. 685 (1952).

The trial court did not make a finding that defendant was guilty of fraudulent concealment, and we find the evidence is insufficient to support such an allegation.

The evidence shows that in the fall of 1961 several of the officials of defendant were concerned that the royalty price negotiated with the United States might have the effect of activating the price adjustment clause of plaintiffs' contract. The question was submitted to defendant's attorneys who advised that payment of royalty would not have this legal effect. Defendant did not make any disclosure to plaintiffs at that time or subsequently which would have allowed plaintiffs the opportunity to seek a determination before an appropriate tribunal. In early 1974 when inquiries were made by plaintiffs, the officials of Arkla were uncooperative and evasive in answer to questions concerning the possible purchase of gas from the United States. Although

this failure to inform and later evasiveness on the part of defendant was not commendable, it nevertheless does not prove fraudulent concealment. A party alleging fraud has the burden of establishing it by more than a mere preponderance of the evidence. The conclusive proof required must be by clear and convincing legal evidence. *Placid Oil Co. v. Taylor*, 345 So. 2d 254 (La. App. 3rd Cir. 1977); *Capital Bank & Trust Co. v. Core*, 343 So. 2d 284 (La. App. 1st Cir. 1977); and *Jackson v. Fontenot Building Inc.*, 314 So. 2d 516 (La. App. 1st Cir. 1975). For these reasons plaintiffs cannot be awarded damages bearing any relationship to an increase in gas prices for the period prior to October 1972.

Defendant primarily complains on appeal of the admissibility and probative value of the plaintiffs' evidence to sustain any award of damages. The evidence relied on by plaintiffs to prove their damages for breach of contract was the testimony of Frank J. Hall, a plaintiff having substantial gas holdings in Sligo that are subject to the contract. The evidence shows Hall to be a knowledgeable oil and gas operator with many years of experience in the exploration for, production, and sale of natural gas. Hall gathered all of the pertinent data necessary to calculate the damages to which plaintiffs claim they are entitled for the entire period from September 1961 through December 1975. Based on the data obtained, Hall, with the assistance of his accountant who is also a plaintiff in this suit, prepared schedules to reflect a comparison in the price being paid by Arkla to plaintiffs with that being paid to the United States for each year during this fourteen-year period. Under the instructions and supervision of Hall, the accountant further prepared summaries which related the differential in the price of gas to the volumes sold by plaintiffs to defendant for the period. Built into these summaries are the adjusting factors which Hall considered necessary to render the prices comparable. The summaries were further extended

to calculate and show the accrual of the legal rate of interest on the sums claimed during the period.

Defendant attacks the admissibility of the above described evidence contending that the schedules and summaries were made from information that has not been offered in evidence. There is a well recognized rule that summaries of voluminous material or documents may be introduced in evidence provided the opposing party has equal access to the material from which the summaries were prepared. Wigmore, "Evidence," (1972) Vol. IV., § 1230, at page 535, *Northern Pac. Ry. Co. v. Keyes*, 91 F. 47 (1898); *Sam Macri & Sons, Inc. v. U.S.A.*, 313 F.2d 119 (1963); *Midcontinent Broadcasting Company v. North Central Airlines, Inc.*, 471 F.2d 357 (1973). In the instant case defendant was in the superior position and had full access to all data on which Hall relied. A substantial part of the information gathered by Hall was from records of defendant's accounting department which were inspected under discovery procedure. Hall utilized division orders prepared by defendant to determine percentages of ownership in each drilling unit over the period in question. To establish production quantities of raw gas and liquid hydrocarbons, he relied partially on records in his own office and on information obtained from the State Department of Conservation. Defendant had equal access to all such data. Although there are others who would have better qualifications because of specialized training to make such an analysis, Hall has exhibited a sufficient familiarity with the underlying principles of gas pricing and methods of accounting to allow the admissibility into evidence of his testimony and the summaries prepared under his supervision for whatever weight they may have.

Defendant also attacks the weight to be given the calculations made by Hall and his accountant as it contends they are self-serving. While this evidence is to some extent self-serving, this reason alone is not sufficient to reject it in the

absence of any rebuttal evidence showing that the evidence as a whole was unreliable and not prepared with any degree of objectivity.

Defendant questions the acceptance of the summaries also on the basis that Hall has calculated plaintiffs' damages by a determination of the difference between gas prices paid to the United States and the plaintiffs and by assuming the plaintiffs' contract was revised to provide for processing of raw gas at defendant's plant and payment of the entire value of extracted liquids to them and assuming that all condensate was processed by defendant free of charge and the proceeds paid to them. Defendant contends these adjustments made by Hall are improper and give plaintiffs advantages which were never intended by the "pertinent factors" adjustments provided in the Favored Nations clause of the contract. The comparability provisions of the Favored Nations clause of this agreement provides:

> . . . provided that in determining whether a given price is in fact "higher" than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts.

A literal reading of this provision requires the interpretation that all pertinent factors necessary to properly

equate the price of gas shall be given consideration and those specified are illustrative only. The only factor to be excluded is the length of the contract term. We find the adjustments made by Hall in the summaries were within the purview of this provision.

Plaintiffs also calculated two other items of compensatory damages claimed by all or some of the plaintiffs. The first relates to losses occurring because of income tax advantages which would have inured to all plaintiffs under depletion allowances had they received the increases in price during the years they were due rather than in a lump amount under a court award. The second refers to losses to several of the plaintiffs who contend they would have drilled an additional well in the field had they been advised timely by defendant of the facts which would have enabled them to have obtained a price increase in 1961. Both the damages for loss of the depletion allowance and the loss arising from the lack of knowledge concerning the increased gas prices are consequential damages which cannot be recoverable for the breach of an obligation to pay money. La. C.C. Art. 1935.

Defendant next complains that the method of the trial court in arriving at the award of damages was erroneous. The trial court accepted the summaries prepared by Hall as competent evidence on which to award damages, but was confronted with the problem that the summaries were prepared for the total period from September 1961 through December 1975. In order to limit plaintiffs' award for the period of October 1972 through December 1975, the court reduced the total damages reflected by Hall's summary by a percentage of sixty-eight percent.

Defendant contends this method is erroneous as it gives no consideration to the differences in the actual volumes of gas produced and sold in the period for which damages are allowed and assumes that they have remained constant over the entire period since 1961. Further, defendant shows

Hall's summary contains a calculation of interest for the entire period of fourteen years, and therefore, the method used by the court allows recovery of interest on sums not recoverable. Defendant also illustrates that the procedure followed by the court does not compensate each plaintiff equally for the volume of gas sold by him during the allowable period.

We recognize that during the presentation of evidence on damages, the trial court suggested to the parties on several occasions the possibility of an appointment of an expert to assist the court in this very complex matter. As this suggestion was not pursued, the court had no means at hand to accurately reduce the summaries in evidence to the period for which plaintiffs were entitled to damages, and therefore, resorted to the percentage of allocation utilized. Plaintiffs are only entitled to damages representing a difference between the price paid by the defendant to the United States and the price paid to them, after applying the adjustments for pertinent factors, for the period from October 1, 1972, through December 31, 1975. They are additionally entitled to interest at the legal rate of seven percent on the increased amount owed to them as it accrued each month during this period. La. C.C. Arts. 1938 and 2553(3).

We must agree that the method used by the trial court does not achieve this result. These calculations cannot correctly and accurately be made by this court from the record before us. Under La. C.C.P. Art. 2164 this court may render any judgment which is just, legal, and proper, including the power to remand for a new trial in the interest of justice. See *Guilott v. Guilott*, 326 So. 2d 551 (La. App. 3rd Cir. 1976).

While we are reluctant to protract this litigation, we find it necessary to remand the case in the interest of justice to both parties for the limited purpose of a recalculation of

the damages and the interest to be allowed each plaintiff in accord with the views expressed herein.

The district court may in its discretion appoint an expert in the field of oil and gas accounting to perform the necessary calculations based insofar as possible on the evidence already in the record in this matter. The court may take whatever additional evidence that is found necessary to calculate damages in accord with these views.

For the foregoing reasons, the judgment is set aside, and the case is remanded for a new trial restricted to the assessment of damages. Costs of this appeal are assessed equally to plaintiffs and defendant. Assessment of all other costs shall await final determination of this cause.

APPENDIX C

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

Office of the Clerk, Shreveport, Louisiana. June 6, 1978

As counsel of record in the captioned case, you are hereby notified that the application or applications for rehearing filed by Plaintiffs-Appellants and Defendant-Appellant have this day been En Banc. Denied.

FRANK J. HALL, et al

versus

ARKANSAS LOUISIANA GAS CO.

Docket No. 13,549

Sincerely,
HAROLD L. BOOTH
Clerk of Court

APPENDIX D

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

September 22, 1978

FRANK J. HALL, ET AL

VS.

ARKANSAS-LOUISIANA GAS COMPANY

No. 62,580

In re: Arkansas Louisiana Gas Company, applying for Certiorari, or Writ of Review, to the Court of Appeal, Second Circuit, Parish of Caddo.

Writ denied.

PFC
FWS
ATJR
JAD
WFM
JLD

SANDERS, C.J., would grant this application, so that it can be considered along with No. 62,560, which has been granted.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
September 22, 1978

/s/ FRANS J. LA BRANCHE, JR.
Clerk

APPENDIX E

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

September 22, 1978

FRANK J. HALL, ET AL

V.

ARKANSAS LOUISIANA GAS COMPANY

No. 62,560

In re: Frank J. Hall, et al applying for Certiorari, or writ of review, to the Court of Appeal, Second Circuit, Parish of Caddo

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Writ granted.

PFC
JWS
ATJR
JAD
WFM
JLD

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans

September 22, 1978

/s/ FRANS J. LA BRANCHE, JR.
Clerk of Court

APPENDIX F

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA
NUMBER 225,699

FRANK J. HALL et al

v.

ARKANSAS LOUISIANA GAS COMPANY

Opinion

The plaintiffs in this case are the owners of mineral leases located within the Sligo Field, Bossier Parish, Louisiana, and they have sold all of their gas production from said leases to the defendant, Arkansas Louisiana Gas Company, since about 1939. Defendant took the gas into its pipeline and into its processing plant and the residue gas was delivered into its pipeline distribution system.

After extended negotiations a new gas sales contract between the parties was executed (see Exhibit P-1) which was dated January 11, 1952, under the terms of which plaintiffs agreed to sell their gas production from their said leases located in the Sligo Field for a period of twenty-eight years for a stated price of $0.08547 per MCF of gas (thousand cubic feet) at a pressure base of 15.025 p.s.i.a., and the defendant, Arkansas Louisiana Gas Company agreed to purchase the gas for said amount and in addition included a "Favored Nations Clause" worded as follows:

Section 8(D)

"(D) *If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered*

under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; provided that in determining whether a given price is in fact 'higher' than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts. It is agreed that *any such higher price* for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction." (Emphasis supplied)

In February of 1961, the defendant, Arkansas Louisiana Gas Company, as lessee, acquired a 15% interest in a mineral lease granted by the United States on its lands in the Sligo Field. (Exhibit P-45). In accordance with the requirements of the lease, the defendant and its co-owners drilled a number of producing wells on the property. The defendant did not sell its 15% of the gas produced under the lease but took it into its pipeline and into its processing

plant where the liquefiable hydrocarbons were extracted and the residue gas was delivered into its pipeline distribution system.

The oil and gas lease from the United States provided, in part, for the rights of the lessee in Section 1:

> "SECTION 1. Rights of Lessee.—That the lessor, in consideration of rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, *and dispose of all the oil and gas deposits owned by the lessor* except helium gas in or under the following-described tracts of land situated in the Barksdale Air Force Base East Reservation, Bossier Parish, Louisiana:—." (Emphasis supplied)

The lessee was to pay royalty to the United States as set forth in Section 2(d)(2):

> "2. To pay the lessor a royalty of 16⅔ per cent of the amount or *value* of production obtained and saved from the leased land. Also, to pay an additional royalty of 8⅓ per cent of the value of production until there has been paid as such additional royalty an amount equivalent to $500 an acre for the total number of acres contained in this lease at time of issuance, such number being that cited in Section 1 hereof. In computing such royalty on gasoline or other products extracted from gas or on gas remaining after extraction of such products, no allowance will be made for the cost of gathering, boosting, transportation, extraction, or processing." (Emphasis supplied)

The lease further provided that the lessor, the United States, had the option of receiving its royalties in "value" or in amount of production as provided by Section 2(d)(4):

> "(4) *At the option of the lessor to pay the respective royalties herein provided for in value or in amount of production.* If paid in value such royalties shall be due and payable monthly on the last day of the calendar month next following the calendar month in which produced. If paid in amount of production the respective royalty products shall be delivered in merchantable condition on the premises where produced without cost to lessor, unless otherwise agreed to by the parties hereto, at such times and at such shipping point as may be designated by the lessor, or in the case of crude oil, in such tanks provided by the lessee as reasonably as may be required by the lessor, but in no event shall the lessee be required to hold royalty oil or other royalty products in storage beyond the last day of the calendar month next following the calendar month in which produced. The lessee shall not be responsible or held liable for the loss or destruction of royalty oil or other products in storage from causes over which it has no control. (Emphasis supplied)

The lessor, the United States, elected to receive its royalties in value. Section 2(d)(5) provided as follows:

> "(5) *It is expressly agreed that the Secretary of the Interior may establish reasonable minimum values for purposes of computing royalty* on any or all oil, gas, natural gasoline, and other products obtained from gas; *due consideration being given* to the highest price paid for a part or for a majority of production of like quality in the same field, *to the price received by the lessee,* to posted prices and to other relevant matters and, whenever appropriate, after notice and opportunity to be heard." (Emphasis supplied)

Beginning in 1962, defendants began to pay the United States Government under the above provision of the con-

tract sums of money based upon a fraction of all gas produced on the lease with the price of gas fixed as $0.117432 per MCF until January 1, 1962, $0.130252 until January 1, 1967, and thereafter $0.140508 at a pressure base of 15.025 p.s.i.a. (Exhibit P-82). At the time these payments began in 1962, the plaintiffs were receiving $0.08797 per MCF.

The principal question in this case is whether or not the payments of money under the above quoted provisions of this contract had the effect of increasing prices under the gas sales contract of plaintiffs as set forth in the Favored Nations provision of said contract, Section 8(D).

Plaintiffs contend that the payments to the United States Government by the defendant under the terms of its lease (Exhibit P-45), but in its position as pipeline purchaser, amounted to a "Purchase from another party seller" within the meaning of plaintiffs' contract with the defendant, Section 8(D), while defendant, in effect, contends that the payments were only a payment of royalty by defendant in its position as lessee and not a purchase of gas, because the United States Government, the lessor, had no title to any gas under the terms of the contract and the amount of gas and the price assigned thereto were only to be used as a measure in figuring that "money" or "value" royalty or rent.

Louisiana has adopted the "non-ownership" theory of oil and gas, that is, that the oil and gas beneath the surface of the ground is not subject to ownership by anyone until it has reached the surface. After a long development the usual oil and gas lease has been held to provide for ownership of the *oil* produced by the lessee and lessor at the time it reaches the wellhead in the proportions set forth in the lease. The lessor is granted the option to receive his royalty as a share of the *oil* production in kind or to be delivered to the pipeline company by the lessee to the credit of the lessor. In the usual situation the lessor sells *his oil* to the pipeline company and is paid therefor by the pipeline

company although it is the lessee that actually delivers the *oil* to the pipeline for the lessor's account.

At the time the oil and gas industry in Louisiana was in its formative stages, there was less demand for natural *gas* and it was less marketable. Mineral leases often granted the lessor the same option to receive his royalty on *gas* just as was done in the case of royalty on *oil*.

The usual more recent mineral lease in use in Louisiana often makes a different provision for royalty on *gas* and only provides for the lessor to receive a fraction of the *amount* received from the *sale* of the *gas*, or a fraction of the fair value of the *gas* if the gas is used by the lessee. Regardless of whether it is oil or gas that is produced, it is usually all sold to the pipeline company at the same price and both lessee and lessor are paid their fractional part of the proceeds of the sale based on the same price rate. Ordinarily a raise in the royalty payment was accomplished by increasing the fractional part of the production due to the royalty owner, rather than a raise in the price of his share of the production.

The plaintiffs in this case have cited authorities for the proposition that such wording of a lease as to *gas* that provides for a "money" royalty or value royalty only authorizes the sale of the lessor's share of the *gas* production to the pipeline purchaser by the lessee for the lessor's account. Plaintiffs then conclude that the lessor does customarily sell *gas* to the pipeline company. On the other hand defendant has presented authorities and citations, both State and Federal, to the contrary. The cases referred to often cite the exact wording of the lease involved.

At this point is becomes important to examine the exact wording of this lease. The lease from the United States Government (Exhibit P-45) treats the royalty due to the lessor on oil and gas in principally the same fashion. It

does not differentiate between *royalty on gas* as opposed to *royalty on oil*. See the emphasized portions of the lease by the United States (Exhibit P-45), Sections 2(d)(2), 2(d)(4) and 2(d)(5). In other words the lease contemplates that the legal title to oil and gas would be the same at the time it reaches the wellhead.

The same Exhibit P-45 in speaking of the rights of lessee in Section 1 thereof as previously quoted herein states that the lessee is granted "—the exclusive right and privilege to drill for, mine, extract, remove, *and dispose of all the oil and gas deposits owned by the lessor*—". (Emphasis supplied).

Because it is well-established that in Louisiana the landowner does not own "deposits" of oil and gas in the ground, but that oil and gas is only subject to ownership when it is produced at the wellhead, it would be impossible for the lessee to "dispose" of *oil* and *gas* deposits "owned" by the lessor until they are produced at the wellhead, but at that point it is possible for the lessee to "dispose" of the production including the share of the *oil* and *gas* production "owned" by the lessor.

Although the words used in the form of the lease (Exhibit P-45) do not seem to be designed for use in a state such as Louisiana that subscribes to the "non-ownership" theory of oil and gas they are consistent with the Louisiana theory if given the above construction. In other words, the lessee is authorized to sell the lessor's share of the *oil* and *gas* production to the pipeline purchaser for the lessor's account.

Defendant argues that the decisions of the Federal Courts have held that no sale of *oil* and *gas* is involved on the part of the United States as lessor in such an instance; otherwise, the Federal Power Commission would be required to exercise jurisdiction of the sale of *gas* produced in interstate commerce, which it does not. Also, if the transaction by the United States, as lessor, amounted to a

sale of *gas* or *oil*, the United States would be required to exercise the option of taking its production in kind and would not be able to dispose of it except by public bid and sale under the applicable Federal statute. In my opinion the answer to these contentions and the testimony of the opinion of the Federal experts is the simple fact that this Court is dealing with the construction of a Louisiana contract under Louisiana law and not the construing of the lease for the purpose of a Federal statute or statutes as were the cases and opinions cited by the defendant. Although inconsistent with the Federal decisions, the inconsistency does not conflict with the Federal statutes to the extent that both cannot co-exist.

Because of the contradiction of legal authority on the technical question of whether a lessor has title of gas to sell there is an ambiguity in the use of the words "—purchase from another party seller—" as used in the contract between plaintiffs and defendant, Exhibit P-1, which cannot be gleaned from the other portions of the contract. For this reason other evidence is admissible to discover the true intention of the parties.

The defendant in this case customarily listed the lessor as a "seller" on its required division orders and required their signatures thereto. Essentially the same form was used by the defendant whether the product produced was oil, gas or condensate. Defendant argues that Section 11 of the contract provided that the plaintiffs would be paid for 8/8th of the gas and would be responsible for paying the royalty and that this provision demonstrates that the intention of the parties was that a lessor was not contemplated as a "seller"; however, the plaintiff points out that this same Section 11 goes on to grant the plaintiffs the option to require the defendant to pay the royalty and in such case the plaintiffs were obligated to furnish signed division orders to the defendant on forms provided by

the defendant and that these forms, in fact, listed the royalty owners as "sellers".

By citing the above facts, it is not my intention that this case be decided on the wording in a division order, but only to demonstrate that the evidence shows the word "seller" to have a broader usage and more general meaning than the more restricted definition plaintiff now asserts.

Defendant next argues that the United States under the lease, Exhibit P-45, was not furnished with any division order nor required to sign a division order and that this fact illustrates that the United States Government, as lessor, was not regarded as a "seller". On the other hand the evidence in this case shows that the United States does not sign a division order, but relies on the lease contract, so that the failure of the defendant to require a division order signed by the United States cannot be relied on to demonstrate the intention of the parties to P-45.

The gas purchase contract in this case between plaintiffs and defendant (Exhibit P-1) was drafted after a long negotiating process. Section 8(d) was the subject of give and take negotiations, each party giving on one point in order to gain another. The only things that this Court can conclude from the evidence of these negotiations is that Section 8(d) was not to be restricted in its application to just other formal "gas purchasing contracts" executed by buyer with other sellers of gas produced in the Sligo Field, but would apply to such a "purchase" of such gas from another party seller by means other than a formal full-fledged gas purchase contract, such as an *oral* contract. See testimony of Mr. Hetherwick, Tr. Vol. 20, p. 74, line 6 to 30. The fact that it was intended to apply to even *oral* contracts evidences an intent that it should have a broad application. It was intended to apply to gas from "any" wells located in the Sligo Gas Field purchased by defendant. In addition the intent of Section 8(d) was to protect plaintiffs against

a rise in the purchase price of gas that might be paid by defendant within the Sligo Field during the long 28-year term of the contract by cutting across some of the traditional lines usually associated with such contracts.

Defendant's principal argument is that in making payment to the United States under its lease, Exhibit P-45, that it was paying royalty as lessee, *not* purchasing gas as pipeline purchaser. On the contrary, defendant was acting in a dual capacity at one and the same time. It was paying royalty as lessee *and* purchasing gas as pipeline purchaser within the meaning and intent of Section 8(d).

For all of the above reasons it is the opinion of this Court that the acceptance of gas produced from the mineral lease executed by the United States, Exhibit P-45, by the defendant as a pipeline operator and payment therefor to the United States constituted a purchase of gas from another party seller within the meaning of the contract of plaintiff, Exhibit P-1.

The defendant next argues that the contract between plaintiff and defendant, Exhibit P-1, is not comparable with the lease from the United States to the defendant, Exhibit P-45. As previously stated, the intention of the parties in the execution of Exhibit P-1 was that Section 8(d) would be broader than just applying to the purchase of gas through a formal gas purchase contract but it was intended to also apply to such things as an *oral* contract, which, in fact, evidences the intent of the parties that the coverage would be extremely broad, because it would neither contemplate that an oral contract would include all the many provisions contained in the full-fledged gas purchase contract, nor necessarily contemplate that the gas purchased be shipped in interstate commerce, since the Federal Power Commission does not recognize an oral contract for the sale and purchase of gas.

The defendant argues that the drilling obligation contained in the lease, Exhibit P-45, provides an item that

makes the two contracts incapable of comparison, but the list of items in Section 8(d) is not an exclusive listing of either pertinent factors of comparison or non-pertinent factors of comparison. It appears to the Court that since Section 8(d) specifically states that the length of the term of the contract shall not be a factor to be considered for comparison of the two contracts that the drilling obligation contained in the lease, Exhibit P-45, would be of the same type of factor and should not be considered for purposes of comparison.

As one would imagine the day-to-day administration and accounting involved in a gas purchase contract is extremely complicated. The defendant is in the business of administering these contracts and the head of its accounting department, Mr. W. W. McLeod, testified that it would be possible to compare the price of gas received by plaintiff under Exhibit P-1 and the price received by the United States under Exhibit P-45, and to compute all the pertinent factors in making the comparison and that it could have been done over the years had he been so instructed at the time. See testimony of Mr. McLeod, Vol. 10, pages 83 to 85, and Vol. 12, page 17.

The defendant in this case has made no comparison between the two prices, it having taken the position throughout that the two are not capable of comparison; however, it is my opinion that the evidence shows that the two are capable of comparison. The best information was or is in the possession of the defendant, although the sheer of volume of the documents to be considered (estimated by defendant at one time as a literal box-car load) and the length of time that has elapsed since most of them were used presents a very difficult picture as to if all are still in existence. The Court is required to act on the best information produced before it. Absolute certainty is not required.

Defendant next contends that one plaintiff, W. E. Hall, Jr., executed a contract on May 25, 1969, deleting the Favored Nations Clause from the 1952 contract for which reason he has no claim against the defendant under Section 8(d) thereof. It is my opinion that the defendant's contentions in this regard are correct and should be sustained. He executed the contract, Exhibit P-285, which deleted the Favored Nations Clause in order to be able to sell gas from a well to the defendant in order to avoid having to operate a compressor for the gas. There was no error as to the principal cause of the contract, Exhibit P-285, nor has he restored or offered to restore the benefit he received under the contract as is a pre-requisite under the Civil Code Articles 1819 and 1882.

Defendant relies on several defenses that arise from the provisions of the Natural Gas Act. The first contention is that plaintiffs cannot recover a raise in prices because plaintiff never obtained approval of the higher rate or price from the Federal Power Commission as required under the Natural Gas Act, 15 U.S.C.A. 717 et seq., adopted by Act of Congress on June 21, 1938. Defendants have cited the case of *Interstate Natural Gas Co. Inc., et al v. Mississippi River Fuel Corporation,* 55 So.2d 755; 220 La. 43, decided by the Supreme Court of the State of Louisiana in 1951. The holding of that case is that the plaintiffs, having failed to apply to the Federal Power Commission to put the increase rate into effect, cannot recover such damages from the defendant.

The plaintiffs point out that the Federal Power Commission, by general rules, has established a system which permits independent producers to obtain from the Commission a "Small Producers Certificate" which authorizes them from the effective date of such certificate to collect increased rates provided by their contract within the limits of the Commission Area Rate orders. Four of the plaintiffs herein, Frank J. Hall, Virgil J. Hall, James A. Noe

and S. G. Myers received Small Producers Certificates effective October, 1972, and would be eligible for the increased rate provided by their contract within the limits of the Commission's Area Rate orders. The remainder of the plaintiffs herein, other than Mr. W. E. Hall, Jr., above referred to, are entitled to the benefit of a Small Producers Certificate under the applicable statutes and would likewise be entitled to collect increased rates provided by their contract within the limits of the Commission's Area Rate orders. See Federal Power Commission Order No. 607 and 607-a. The evidence demonstrates that the prices paid to the United States per MCF of gas was below the maximum area rate established in these orders, which means that the area rate schedule would not actually impose any limit under the facts of this case after October, 1972, but would prevent recovery before that date.

Defendant has pled prescription of one, three and ten years. The facts of this case are that the lease from the United States, Exhibit P-45, was not even of record in Caddo Parish, Louisiana, nor was the information available giving the prices being used to compute the Government's royalty payment until plaintiffs were able to obtain the information about June 26, 1974. Suit was filed July 18, 1974.

Prescription does not run against one who is ignorant of the existence of facts that would entitle him to bring a suit, when such ignorance is not willful and does not result from negligence. Plaintiffs were not advised of the facts in this case until they succeeded in obtaining a letter dated June 25, 1974, from Mr. F. L. Stelzer which included the lease from the United States, Exhibit P-45, and the letter of establishing the price set by the Government, Exhibit P-65, and the letter in which defendant acceded thereto, Exhibit P-82. Under this state of facts prescription does not run against plaintiffs and defendant's plea of prescription is to no avail.

One of the plaintiffs herein, Frank J. Hall, was qualified as an expert in the oil and gas business, having drilled and produced wells for many years. He, or others under his direction, has prepared contracts, bought and sold gas and oil, mineral leases, royalty, minerals, managed properties, and dispersed and paid royalties on gas production. I find that he has sufficient expertise because of his experience to permit the introduction of his calculations or those made under his supervision and direction. The objection goes to the weight of the evidence and not to its admissibility.

Mr. Hall with the help of persons working at his direction prepared a calculation of the difference in prices between the two contracts in dispute here after consideration of all the pertinent factors. He then considered the volumes of gas purchased from plaintiffs and the fractional part attributable to each plaintiff's share. This calculation is the best evidence that the Court has before it and appears to be reasonable. This calculation, however, was based upon the entire period of the claim back from 1961, to December 31, 1975; whereas, the effective date of the Small Producers Certificates began in October, 1972. It is the opinion of this Court that, considering the differences in prices each year and the share attributable to each plaintiff that his itemization of the total damage due each plaintiff, except W. E. Hall, Jr., should be reduced by 68% to correctly reflect the deletion of plaintiffs' claims before October, 1972; damages for loss of depletion allowance; damages for failure to drill Section 17, and to recognize the difference in the comparisons involving raw condensate, wet gas, extracted products, manufactured products and combinations of each.

Defendant has made no claim that the fractional division of ownership between plaintiffs is in error, that the division is contrary to the records in its own division order department, or that there is any adverse claim of title against any of the interests of plaintiffs. Under the terms of its own

division orders defendant cannot equitably refuse to pay the additional sums, there being no reason to fear that the defendant would have to pay said sums to some one else.

Let there be judgment against the defendant in favor of plaintiffs in the following amounts, plus costs and interest from January 1, 1976:

Frank J. Hall	—	$135,413.44
Virgil J. Hall, widow	—	36,930.88
Carlyle W. Urban, Trustee under will of H. M. Harrell	—	202,954.56
John K. Harrell, Sr.	—	25,368.96
James E. Harrell	—	25,368.96
Elva L. Weiss, widow	—	56,853.12
National American Bank, Executor under Will of Seymour Weiss	—	56,853.12
T. F. Philyaw	—	1,187.84
W. O. Cochran	—	4,644.16
D. B. McConnell	—	42,301.76
S. G. Myers	—	41,668.80
James A. Noe	—	153,128.96
Asa Benton Allen	—	21,530.24
Elaine Allen	—	20,874.88

Let there be further judgment in favor of defendant, Arkansas Louisiana Gas Company, rejecting the demands of plaintiff, W. E. Hall, Jr., at his costs.

October 14th, 1977.

/s/ C. J. Bolin, Jr.
C. J. Bolin, Jr.
District Judge

APPENDIX G

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA
Number 225,699

FRANK J. HALL, ET AL

v.

ARKANSAS LOUISIANA GAS COMPANY

Opinion on Defendant's Motion for New Trial Limited To Reargument and Supplement To Motion for New Trial and Opinion on Plaintiffs' Motion for New Trial Limited To A Rehearing and Motion for Modification of Judgment

The defendant in its motion and supplemental motion for a new trial strenuously argues that it did not breach Section 8(d) of the contract with plaintiffs.

After carefully considering the arguments made, it is still my opinion that insofar as 8(d) is concerned the effect is (and should be) the same regardless of whether P-45 was executed by the United States as lessor or had been executed by a private party as lessor; that P-45 gave the lessor, the United States, the right to exercise every incident of ownership of its royalty and when it elected to be paid in value it had the unusual right to fix the value of the production upon which its royalty payments were calculated, all of which rights are consistent with ownership of the royalty by the lessor and a purchase of gas by defendant-pipeline operator; that this Court is dealing with the construction of the Louisiana law, Section 8(d) of Exhibit P-1, which was intended to have a broad application, to apply to gas from "any" wells located in the Sligo Gas Field purchased by defendant, and with the purpose of protecting plaintiffs against a rise in the purchase price of gas that might be paid by defendant within the Sligo Field during the long twenty-eight year term of the con-

tract by cutting across some of the traditional lines usually associated with such contracts; the lease from the United States, Exhibit P-45, is to be construed in the light of such intent and purposes and, insofar as Section 8(d), in accordance with Louisiana law.

Defendant relies on the case of *Wallis v. Pan American Petroleum Corporation,* 384 U.S. 63; 16 L.Ed 2d 368; 86 Sup.Ct. 1301, but that case specifically held that the federal common law does not govern the dealings of private parties in an oil and gas lease validly issued by the United States under the Mineral Leasing Act of 1920, and that the decision of the case would depend upon state law. The court refused to extend the application of federal law beyond the initial grant of the lease therein involved and even refused the argument "that federal law retains its initial hold on the lease until existing equities are resolved." Cases cited in that decision which did extend federal law to govern the outstanding equities existing at the time of an original grant of land were distinguished and "explained by a specific federal interest found in conflict with local law." Other cases were distinguished where there was *no* specific federal interest, because there was *no conflict with* local law. See 16 L.Ed 2d 369, at page 375. In the instant case there is also *no* specific federal interest in the construction of the contract between plaintiff and defendant and Section 8(d) thereof and, as stated in this Court's previous opinion, there *is a conflict with local law.*

The defendant here has relied on the case of *Miree v. United States,* 538 F. 2d 643, in arguing that federal law should control in the construction of the lease from the United States, P-45, insofar as its effect on Section 8(d). The facts of that case were that DeKalb County, Georgia, entered into an agreement with the Federal Aviation Administration whereby in return for a grant of money by that agency DeKalb County gave the FAA certain assurances, among which were its promises that it would operate its airport for the use and benefit of the public, maintain it in a safe and serviceable condition, and limit use of adjacent land so that it would not interfere with the safe use of the airport. Thereafter, a jet aircraft crashed after ingesting birds swarming over the airport and feeding on the adjacent county garbage dump. The persons injured and representatives of the persons thus killed filed suit against DeKalb County as *third-party beneficiaries under the county's agreement under the FAA*. The United States Court of Appeals, Fifth Circuit, held in an en banc decision held that the Federal Common Law would apply, not the law of Georgia. Five judges of the court joined in a dissenting opinion.

The dissent in the above cited case sets forth principles and authorities which apply to the facts of the instant case. The facts of the instant case are at least two steps removed from those in the above cited case: (1) because plaintiffs here are not suing as third-party beneficiaries of the agreement with the United States, but are seeking to enforce an entirely Louisiana contract and provision 8(d) thereof. (2) the Federal Government is not a party to this suit and should have no particular interest in the outcome of this lawsuit. The interest of the Federal Government in the construction of Exhibit P-1 and Section 8(d) thereof is too remote to require the application of federal law, but the State of Louisiana has an interest in construing this Louisiana contract and Section 8(d) thereof in the same fashion regardless of whether the triggering mechanism be a purchase of gas from a private individual or the United States.

Defendant likewise relies on the case of *Murphy Corporation* v. *Fontenot,* 225 La. 379; 73 So.2d 180, for the proposition that the Supreme Court of the State of Louisiana has held that "the fugitive oil and gas when captured did not belong to the Federal Government but to private owners". The case did not involve an attempt to collect severance tax on the entire 8/8ths of the production from the

lease, but only that 6/8ths portion belonging to the lessees. The opinion states on Page 182 "protective measures from the drainage were sought and secured by the Government's selling exploratory rights to private purchasers and lessees who became the *owners of all* the severed minerals when they were captured, *except a 2/8th royalty* paid the U.S. Government." At Page 183 the opinion used the following language "—and the Government retained 2/8ths royalty rights in the oil and gas produced—". Actually the opinion did not address the question of the legal title of the 2/8ths production, but if so then the opinion excepts the "2/8ths royalty paid the U. S. Government" and seems contrary to defendant's contentions.

The plaintiffs in their motion contend that the case of *Interstate National Gas Company, Inc., et al v. Mississippi River Fuel Corporation,* 220 La. 43; 55 So.2d 775, was not the authority for the proposition cited by the Court in this case. The decision of the Louisiana Supreme Court there construed a gas purchase contract, the question being whether or not the contract and the amendment thereto resulted in a debt which accrued before 1938, the date the National Gas Act went into effect, or whether or not the result was a price increase that was to go into effect in 1944. The Court found that it was not an accrued debt, but rather a part of a price increase and plaintiffs had failed to apply to the Federal Power Commission as required by the National Gas Act (and even though the parties had contracted therefor), plaintiff was denied recovery. For this reason the decision does have an application to the facts of this case.

Plaintiffs also contend that the decision of this Court is contrary to that of other state judges and the federal court in this case in recognizing a defense under the National Gas Act, but my understanding of those decisions is that those courts looked to see whether or not plaintiff stated a cause of action and permitted the case to go to trial. De-

fenses based upon the National Gas Act, which are affirmative defenses, were to be pled and proved by the defense, as was done in this case.

Plaintiffs properly point out that one plaintiff, S. G. Myers, did not acquire his interest in the properties until December 1, 1972, and would not be subject to the reduction of 68% imposed by the Court. For this reason it is my opinion that Mr. Myers is entitled to his total damages of $130,215.91, but all other damages were properly calculated and are to remain the same.

The motion for new trial and supplemental motion for new trial filed by defendant is denied.

The plaintiffs' motion for new trial limited to a re-hearing and motion for modification of judgment is granted limited to re-argument and, the re-argument having been had, let there be judgment in favor of plaintiffs and against defendant all as previously granted, except that the amount of damages awarded to Sidney G. Myers is fixed at $130,215.91, instead of the amount originally stated.

December 2nd, 1977.

/s/ C. J. Bolin, Jr.
C. J. Bolin, Jr.
District Judge

APPENDIX H

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

NUMBER 225,699

FRANK J. HALL, ET AL

VERSUS

ARKANSAS LOUISIANA GAS COMPANY

Judgment

This case having come on regularly for trial on its legal merits on September 27, 1976, and the trial of said case having been concluded on January 14, 1977; and the case having been submitted for decision on June 20, 1977, after the completion of oral arguments and the filing of written briefs, the Court having found the law and the evidence to be in favor thereof and for reasons assigned in written Opinions dated October 14, 1977 and December 2, 1977, which have been filed in the record herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the following Plaintiffs against the Defendant, ARKANSAS LOUISIANA GAS COMPANY, awarding to said Plaintiffs the sums as hereinafter set forth, to wit:

FRANK J. HALL	—	$135,413.44
VIRGIL J. HALL, widow	—	36,930.88
CARLYLE W. URBAN, Trustee under Will of H. M. HARRELL	—	202,954.56
JOHN K. HARRELL, SR.	—	25,368.96
JAMES E. HARRELL	—	25,368.96
ELVA L. WEISS, widow	—	56,853.12

NATIONAL AMERICAN BANK, Executor under Will of SEYMOUR WEISS	—	56,853.12
T. F. PHILYAW	—	1,187.84
W. O. COCHRAN	—	4,644.16
D. B. MCCONNELL	—	42,301.76
JAMES A. NOE, JR. and C. T. MUNHOLLAND, Testamentary Executors under Last Wills of Mr. and Mrs. JAMES A. NOE	—	153,128.96
S. G. MYERS	—	130,215.91
ASA BENTON ALLEN	—	21,530.24
ELAINE ALLEN	—	20,874.88

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above and foregoing Plaintiffs are awarded legal interest on the above and foregoing sums from January 1, 1976, until paid and for all costs of this proceeding.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the Defendant, ARKANSAS LOUISIANA GAS COMPANY, rejecting the demands of the Plaintiff, W. E. HALL, JR., at his cost.

JUDGMENT RENDERED herein by virtue of written Opinions dated October 14, 1977 and December 2, 1977, respectively, which are filed in the record of this proceeding.

JUDGMENT READ AND SIGNED on December 5, 1977, at Shreveport, Louisiana.

/s/ C. J. BOLIN, JR.
C. J. Bolin, Jr.
District Judge

APPENDIX I

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

NUMBER 225,699

FRANK J. HALL, ET AL

VERSUS

ARKANSAS LOUISIANA GAS COMPANY

Opinion

For decision is defendant's exception to the jurisdiction of this Court. The plaintiffs seek damages for defendant's alleged breach of contract. Plaintiffs contend that in 1961 defendant began buying Sligo Field gas from the United States government at a price higher than was being paid to plaintiffs for their gas under the 1952 contract entered into between defendant and plaintiffs or plaintiffs' predecessors in title. Plaintiffs contend that this activated the Favored Nations clause of the contract, Section (D), which would require defendant to pay to plaintiffs a price equal to the highest price paid the government. Defendant contends that this Court does not have jurisdiction.

This Court clearly has jurisdiction under the United States Supreme Court decision in *Pan-American Petroleum Corporation vs. Superior Court of Delaware,* 81 S. Ct. 1303 (1961). There the Court held that claims arising under state law, in that case a claim sued in contract or quasi-contract, were a proper subject for a state court to exercise jurisdiction. The Court further stated that this jurisdiction was not abrogated by the Natural Gas Act. Defendant's declinatory exception is without merit and is therefore overruled.

This Court has carefully read the briefs which able counsel for plaintiffs and defendant have filed, as well as the supplemental letters and attachments. We mention this for

the purpose of making it clear to counsel that we have considered all points which have been raised, since the briefs filed by counsel will not be part of the record which will be considered by an appellate court.

July 30, 1975.

/s/ JAMES E. CLARK
Judge

APPENDIX J

NATURAL GAS ACT

United States Code, Title 15

§ 717c. Rates and Charges: Schedules: Suspension of New Rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification or service, or in any rule, regulation or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be

given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any

amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

June 21, 1938, c. 556, § 4, 52 Stat. 822; May 21, 1962, Pub.L. 87-454, 76 Stat. 72.

§ 717d. Fixing Rates and Charges: Determination of Cost of Production or Transportation

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are

unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

June 21, 1938, c. 556, § 5, 52 Stat. 823.

APPENDIX K

Federal Power Commission Regulations Under The Natural Gas Act, Code of Federal Regulations, Title 18

§ 154.92 Filing of Rate Schedules By Independent Producer.

(a) Every independent producer who on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, filed with the Commission rate schedules, as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who subsequent to the effective date of this part, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

(c) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of paragraphs (a) and (b) of this section file a state-

chaser, and (4) the geographical location (field, county, and State) at which delivery is made.

(d)(1) Every independent producer seeking authority to render natural gas service previously authorized by the Commission, as successor in interest in all the properties or other rights covered by a particular rate schedule, shall file three copies of the instrument of assignment whereby the assignee acquired the properties (or rights therein) involved, along with a request that the assignor's rate schedule be redesignated as the rate schedule of the assignee. He shall also file three copies of an informational summary, in the form prescribed in § 250.8 of this chapter, for each contract of sale or transportation of gas involved in the assignment.

(2) Where the authority being sought under subparagraph (1) of this paragraph relates only to an assigned portion of the rights covered by the rate schedule of the assignor, the assignee shall file, as his rate schedule, three copies of the assignor's basic contract of sale, as amended, and of the instrument of assignment together with the informational summary required by subparagraph (1) of this paragraph.

(3) If the rate schedule of the assignor relating to the rights assigned is in effect subject to refund or if the sale is being made by the assignor under temporary authorization subject to a rate refund condition, authority to render service will be granted to the assignee only upon condition that he file assurance by way of bond or undertaking that he will refund, at such times and in such amounts to such persons as the Commission may find to be entitled thereto any portion of the rate which had been permitted to become effective pursuant to § 154.102 or the rate condition in the assignor's temporary authorization as may be found by the Commission not to be justified. Assignee's obligation to refund, in the absence of his voluntary assumption of some greater proportion of assignor's liability, shall attach as of

the effective date of the Commission's order granting the assignee a certificate or temporary certificate as the base may be unless otherwise ordered or provided.

(e) Any jurisdictional natural gas company that maintains a rate schedule on file with the Commission or makes application to have a rate schedule approved by this Commission or modifies any existing or proposed rate schedule must, in addition to the requirements of this or any other section, complete and submit Form No. 108, or applicable schedules thereof, pursuant to the direction of § 260.6 of this chapter.

[Order 174-B, 19 F.R. 8808, Dec. 23, 1954, as amended by Order 278, 29 F.R. 3699, Mar. 25, 1964; Order 556, 41 F.R. 52443, Nov. 30, 1976]

§ 154.93 Rate Schedule Defined.

For the purpose of §§ 154.92 through 154.101 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission: *Provided,* That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(b) Provisions that change a price to a specific amount at a definite date;

(b-1) Provisions that permit a change in price to the applicable just and reasonable area ceiling rate which has been, or which may be, prescribed by the Commission for the quality of the gas involved; and

(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question: *Provided further,* That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

[Order 174-B, 19 F.R. 8807, Dec. 23, 1954; as amended by Order 232, 26 F.R. 1983, Mar. 8, 1961; Order 232-A, 26 F.R. 2850, Apr. 6, 1961; 242 27 F.R. 1356, Feb. 14, 1962; Order 329, 31 F.R. 15485, Dec. 8, 1966]

§ 154.94 Changes In Rate Schedules.

(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to § 154.92, without first filing a change in rates pursuant to section 4(d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale

subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to § 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to § 154.92 shall be filed with the Commission in triplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule not constituting a change in rate level by any means there shall be submitted reasons, nature and basis for the proposed change and the date upon which the change is proposed to be made effective. Changes in service such as compression, dehydration, etc., by either seller or buyer shall be considered as a change in the existing rate level.

(f) *Notice of change in rate level.* (1) An independent producer who has sold in interstate commerce 5,000,000 Mcf of gas or less annually in each year of his operations during the preceding five years and who is proposing a contractual change in rates, charges, etc., shall file the information called for in the following form:

NOTICE OF INDEPENDENT PRODUCER RATE CHANGE FILING

1. Producer

.....

(Name)

.....

(Address)

2. Buyer

.....

(Name)

3. Location of sale ..

.....

(Field) (County) (State)

4. (a) FPC gas rate schedule No. .....

(b) Basic contract date .....

5. (a) Type of increase

.....

(Periodic, favored-nation, renegotiated, etc.)

(b) Contract basis

.....

(Specify Contract Provision)

(c)

.....

(Proposed Effective Date)

6. Rates in cents per Mcf at ..... psia:
(Specify)

(a) Present effective rate:

Base rate	*Tax Reimbursement*
.....	.....
Other [1] *(specify separately)*	*Total rate*
.....	.....

(b) Proposed rate:

Base rate	*Tax Reimbursement*
.....	.....
Other [1] *(specify separately)*	*Total rate*
.....	.....

7. Statement of estimated sales volume and comparative revenues for the twelve-month period succeeding the proposed effective date (shown with volume and rates at the same psia as in Item 6):

Estimated volume (Mcf)	*Revenues at present effective rate*
.....	.....
Revenues at proposed rate	*Difference in revenues*
.....	.....

8. Average Btu content per cubic foot of the gas sold during the last twelve-month period .....; estimated for the succeeding twelve-month period .....

(Date) (Signed)

....

(Title)

.....

[1] Dehydration, compression, Btu adjustment, etc.

(2) An independent producer who has sold in interstate commerce more than 5,000,000 Mcf of gas annually in any year during the preceding five years and who is proposing a contractual change in rate level to a price below or equal to the applicable area price level for increased rates as set out in the Statements of General Policy No. 61-1, as amended (§ 2.56 of this chapter), shall file the information required in subparagraph (1) of this paragraph and may, at his option, submit a statement in support of the proposed change but shall, in any event, submit additional information in explanation of any pertinent circumstance not specifically required by the form.

(3) An independent producer who has sold in interstate commerce more than 5,000,000 Mcf of gas annually in any year during the preceding five years and is proposing a contractual change in rate level to a price higher than the applicable area price level for increased rates set out in the Statement of General Policy No. 61-1, as amended (§ 2.56 of this chapter), and any independent producer (regardless of the quantity of annual sales) proposing an ex parte or unilateral rate change shall file, in addition to the information required by subparagraph (1) of this paragraph, a full statement in support of the proposed change in rate.

(g) A complete copy of all material filed pursuant to this section shall be furnished to each party to the rate schedule. With each such filing there shall be submitted to the Commission a list of the parties to whom such material has been furnished.

[Order 174-B, 19 F.R. 8807, Dec. 23, 1954; as amended by Order 202, 23 F.R. 3715, May 29, 1958; Order 217, 24 F.R. 9469, Nov. 25, 1959; Order 240, 27 F.R. 252, Jan. 10, 1962]

§ 154.95 Oral Agreements.

If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission. If the parties are not able to agree to the precise terms within a reasonable time, the applicant shall file, in triplicate, a statement of his understanding of the agreement, serving a copy thereof on the other parties to the agreement. Such other parties, in the latter event, may subsequently file, in triplicate, their understanding of the agreement.

[Order 174-B, 19 F.R. 8809, Dec. 23, 1954, as amended by Order 202, 23 F.R. 3716, May 29, 1958]

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§ 157.40 Exemption of Small Producers From Certain Filing Requirements.

(a) *Definitions.* (1) A "Small Producer" is an independent producer of natural gas as defined in § 154.91 of this chapter, who is not affiliated with a natural gas pipeline company and whose total jurisdiction sales on a nationwide basis, together with such sales of "affiliated producers" are not in excess of 10,000,000 Mcf at 14.65 p.s.i.a during any calendar year. As used in this section, the term "jurisdictional sales" includes volumes of gas paid for but not taken under prepayment clauses or otherwise, and volumes of gas sold under other independent producer rate schedules in the proportion that the independent producers seeking to come within this section has an interest in such sales, but does not include sales made pursuant to percentage sales contracts.

(2) "Affiliated producers" are persons who, directly or indirectly, control, or are controlled by, or are under common control with, the applicant producer. Such control exists if the producer has the power to direct or cause the direction of, or as a matter of acual practice does direct, the

management and policies of another producer, whether such power is exercised alone or through one or more intermediary companies, or pursuant to an agreement, and whether such power or practice is established through a majority or minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, associated companies, relationship of blood or marriage, or any other direct or indirect means. For the further purposes of this section, the term "agreement" shall not include any agreement for the operation of a natural gas producing property or a plant processing natural gas or any joint venture, partnership, nominee, or other type of agreement pertaining to the joint exploration for and development and operation of oil and gas properties, unless such agreement otherwise establishes the power of one producer to direct or cause the direction of the management and policy of another producer. Also, for the further purposes of this section, the existence of one or more directors of an applicant producer in common with another producer shall be deemed a conclusive presumption of affiliation and control.

(3) "Small producer sales" are (i) sales by a small producer of his own interests under his own contracts; (ii) sales of all interests under a small producer's contract if producers not qualifying as small producers have interests which in the aggregate are no greater than 12½ percent; and (iii) sales of a small producer's interests under another producer's contract.

(b) *Procedure for securing blanket small producer certificate.* (1) Small producers may apply for a blanket certificate to cover all existing and all future jurisdictional sales that do not raise the producer's total jurisdictional sales on a nationwide basis above 10,000,000 Mcf during any calendar year. Applications by these producers shall include the following information: (i) Total jurisdictional sales on a nationwide basis for the year preceding the ap-

plication; (ii) a list of outstanding certificates and rate schedules together with names and percentage of interest of other interest owners under such rate schedules; (iii) a list of outstanding rate schedules of others in which applicant owns an interest together with applicant's percentage of interest; and (iv) the names of all owners (stockholders, partners, joint venturers, etc.) of the applicant with an interest of 10 percent or more, their percentage of ownership in the applicant and in any other natural gas company, and any positions such owners may hold with another natural gas company.

(2) An applicant for a blanket certificate who has no outstanding certificate issued by, or rate schedule filed with, this Commission for the sale of natural gas shall include the following information in his application:

(i) A list of all contracts to sell natural gas in interstate commerce.

(ii) Source of production, total rate and the annual volume delivery obligations of the producer under each such contract, together with names and percentage of interest of other interest owners under each such contract, and

(iii) A list of owners of the applicant with an interest of 10 percent or more, their percentage of ownership in the applicant and in any other natural gas company and any position such owners may hold with another natural gas company.

(3) The application shall contain the information required by the form set out in § 250.10 of this chapter. A conformed copy shall be served upon each of the applicant's purchasers.

(c) *Rate and certificate regulation under blanket certificate.* Small producers certificated hereunder shall be authorized to make small producer sales pursuant to existing and future contracts at the following rate levels:

(1) All sales of natural gas by small producers for resale in interstate commerce made in accordance with, and under the provisions of Opinion Nos. 699, et seq., shall be made at a maximum base rate of 130 percent of the applicable base ceiling rate established by the Commission in Opinion No. 699, et seq.

(2) All sales of natural gas by small producers for resale in interstate commerce made in accordance with, and under the provisions of Opinion Nos. 749, et seq., shall be made at a maximum base rate of 35.0¢ per Mcf except as provided for below:

(i) For gas produced in the Permian Basin Area, as defined by Opinion Nos. 662 and 662-A, and sold pursuant to contracts dated on or after October 1, 1968, small producers shall be entitled to collect a maximum base rate of 40.5¢ per Mcf.

(ii) For gas produced in the Rocky Mountain Area, as defined in Section 154.109(b) of the Commission's Regulations and Opinion No. 699, et seq., small producers shall be entitled to collect a maximum base rate of 40.5¢ per Mcf. The above rates are subject to any adjustments permitted or required under the particular order of general applicability involved. Such rate may be charged and received by the small producer and paid by the purchaser, as the lawful, just and reasonable rate approved by the Commission pursuant to sections 4, 5, and 7 of the Act. However, no small producer shall be relieved from compliance with section 7(b) of the Natural Gas Act with respect to any small producer sale regulated hereunder. Rate regulation as prescribed herein shall not apply to any jurisdictional sales made by a small producer where the gas reserves relating thereto were acquired by the purchase of developed reserves in place from a large producer. Nothing done hereunder shall be recognized by the Commission as triggering any escalation clause in an existing contract involving a pro-

ducer not covered by a small producer certificate, except as provided in paragraph (f) of this section.

(3) All sales of natural gas by small producers for resale in interstate commerce that qualify for the base ceiling rate of 93 cents per Mcf set in Opinion No. 770-A shall be made at a maximum rate of 130% of that ceiling rate.

(4) All sales of natural gas by small producers for resale in interstate commerce that qualify for the base ceiling rate of $1.42 per Mcf set in Opinion No. 770 shall be made at that ceiling rate.

(d) *Duration of the exemption.* The exemption authorized hereunder shall remain in effect for each small producer until the Commission on its own motion or on application terminates such certificate because the producer no longer qualifies as a small producer or fails to comply with the terms of the exemption. Upon such termination the producer will be required to file separate certificate applications and individual rate schedules for future sales but the exemption will still be effective as to those made under contracts dated prior to such termination.

(e) [Reserved]

(f) *Filings by large producers with respect to related resales.* A large producer may file for the price specified in its related contract for the resale of any natural gas sold to it by a small producer pursuant to the exemption authorized hereunder. In determining whether to accept or suspend such a filing, we shall be guided by the rate level sought and the size of the differential between the purchase and resale price. A large producer under an area rate clause in its resale contract may file for the rate paid by it for gas purchased from a small producer as long as the rate does not exceed the just and reasonable rate prescribed in paragraph (c) of this section.

(g) *Filing of contracts and notification of abandonment.* Pipeline purchasers and large producer purchasers shall

file, within 60 days of the execution thereof, each new contract and each contract amendment dated on or after March 18, 1971, for the sale of natural gas to them by a small producer pursuant to the exemption authorized hereunder, together with an estimate of the purchase volumes and the rate to be charged for the first full year after the commencement of deliveries with respect to each new contract and each contract amendment dedicating additional natural gas, and shall notify this Commission of the cessation of deliveries made by a small producer pursuant to the exemption authorized hereunder within 60 days of such cessation.

(h) *Resale authorization for large producer.* A large producer who has filed on or after July 15, 1971, an application for a certificate of public convenience and necessity for the resale of natural gas purchased from a small producer authorized to sell such gas pursuant to the blanket certificate provisions in paragraph (c) of this section may resell such gas at any time after the filing of its certificate application pending final Commission action thereon. Any amounts collected by a large producer for resales made pursuant to this paragraph in excess of the rate finally determined to be required by the public convenience and necessity for such resales shall be subject to refund with interest at 7 percent per annum.

[Order 428, 36 F.R. 5601, Mar. 25, 1971, as amended by Order 428B, 36 F.R. 13384, July 21, 1971; Order 428-C, 37 F.R. 7591, Apr. 18, 1972; Order 428-E, 39 F.R. 26631, July 22, 1974; Opinion No. 742, 40 F.R. 41772, Sept. 9, 1975; Order 553, 41 F.R. 32213, Aug. 2, 1976; Order 553-A, 41 F.R. 40100, Sept. 17, 1976; 41 F.R. 50242, Nov. 15, 1976; 41 F.R. 56792, Dec. 30, 1976]